

Mr. Kok argued that the appeal board in its decision had misconstrued section 6(c) of the Control of Rent Act, 1966. For convenience, I reproduce hereunder the whole of section 6 of the Act —

"6. For the purposes of determining the fair rent of any controlled premises under this Act, in addition to the factors referred to in sub-section (3) of section 5, the following factors shall be taken into consideration, namely —

- (a) the location of the controlled premises in question;
- (b) the age and character of the controlled premises;
- (c) the state of repair of the controlled premises;
- (d) the type of the controlled premises, that is, whether the premises is business or domestic premises; and
- (e) any improvements made to the controlled premises by the tenant where such improvement was made with the written consent of the landlord.

Provided that nothing in this section shall entitle a tenant to ask to be taken into consideration any goodwill attached to the controlled premises by reason of any business carried on thereat by the tenant or his predecessors in title of such business."

The relevant part of the appeal board's decision states —

"The evidence adduced clearly shows that only items (i) and (iv), the location and character of the premises are in favour of the landlord. Under the circumstances we are of the view that the Rent Tribunal had erred in allowing the maximum increase of one hundred per cent and in not giving due consideration to the fact that the premises was over 60 years old and that the tenant had carried out substantial repairs and maintained the premises in a good condition."

The applicants contend that section 6(c) of the Act should be construed in favour of the applicants as the appeal board had held that the tenant had carried out substantial repairs and maintained the premises in a good condition. The applicants say that section 6(c) of the Act is tied up with section 6(e). It is the contention of the applicants that where no terms as to repairs are provided, it becomes the tenant's responsibility to repair. That may be so, but it is not for this court to determine, in dealing with this application, the responsibility of any party as regards repair. Primarily it is for this court to consider whether there is any error of law on the face of the record. In any event, there is nothing on record to show whose responsibility it is to repair.

The appeal board quite properly took into consideration matters which by law may properly be taken into account. If that was what the board had done, I am unable to see how the applicants' counsel can be heard to say that the board acted contrary to law. The applicants' counsel has also failed to show that the board has acted contrary to section 6(e) or otherwise than in accordance with the law. There is no way of reading the minds of the board and this court cannot go behind the record and assume something which is not disclosed from the record.

On the face of the record, there is nothing to indicate that the board, in considering the fact that the tenant had carried out substantial repairs and maintained the premises in a good condition in favour of the respondent, had done so erroneously to warrant the issue of an order of *certiorari*.

Mr. S. Y. Chan, counsel for the respondent, quite rightly pointed out that the relief sought by way of

A *certiorari* will be open where the board is shown to have acted otherwise than in accordance with the law and outside its jurisdiction. Referring to *Rex v. Northumberland Compensation Appeal Tribunal, Ex-parte Shaw, supra*, it is argued that in that case, there was a manifest error of law. This is clear from the finding of the court when it held that —

B "on the true construction of the National Service (Transfer of Officers and Compensation) Regulations, 1948, reg. 2, the applicant's service with the local authority should have been taken into account."

Mr. Chan further referred to me *Rex v. Furnished Houses Rent Tribunal for Paddington and St. Marylebone, Ex-parte Kendal Hotels, Ltd.*⁽³⁾ where it was held that —

C "*certiorari* does not lie to bring up and quash a decision of a tribunal constituted under the Furnished Houses (Rent Control) Act, 1946, when the decision is good on its face and not outside the jurisdiction of the tribunal."

This case was followed in *Rex v. Agricultural Land Tribunal for the South Eastern Area, Ex-parte Bracey*⁽⁴⁾ where it was held that —

D "Where an inferior tribunal acting within its jurisdiction makes an error of law (e.g., in acting on no evidence or in acting on evidence which ought to have been rejected or in failing to take into consideration evidence which ought to have been considered), *certiorari* cannot be granted to quash the decision of the tribunal for that error of law unless the error appears on the face of the record, and the court, on application for *certiorari*, is not entitled to look behind the record or to receive evidence for that purpose."

E In the present case, I am unable to conclude that, on the face of the record, the appeal board had acted erroneously and outside its jurisdiction and in my judgment, this application cannot succeed. I would therefore dismiss the application with costs.

Application dismissed.

Solicitors: Mah & Kok; Sharikat S. Y. Chan.

G PARMESHIRI DEVI & ANOR. v. PURE LIFE SOCIETY

[O.C.J. (Abdul Hamid J.) September 25, 1970]

[Kuala Lumpur — Civil Suit No. 939 of 1966]

H Trust — Alleged declaration of — Lease of school and premises free of rent in consideration of society maintaining and managing school — Whether effective declaration of trust.

I The plaintiff in this case claimed the return of \$179,400 and further or alternatively damages for breach of trust. The plaintiff had intended to perpetuate the memory of her late father, Lala Kishan Dial and had executed a lease of the Kishan Dial School and premises at Kandang Kerbau Road, Kuala Lumpur in favour of the defendant society free of yearly rent in consideration of the society maintaining and managing the school and premises and on the express conditions that the society shall continue to operate, manage and run the school in the name and style of the Kishan Dial School. Subsequently a piece of land was given to the society as a gift on the express condition that a new school was to be put up on the land by the society. The society began to collect funds for building the school on the new premises and partly from donations and partly from profits of the school, it had collected approximately \$179,400. The society at its annual general meeting resolved to name the school

the Satyananda School. The plaintiff thereupon brought the action for the return of the sum of \$179,400 and damages for breach of trust. The school premises at Kandang Kerbau Road had been surrendered by the society.

Held: there had not been any effectual declaration of trust in this case. The document executed by the donor and the society could only amount to an agreement or contract under which the parties have agreed to bind themselves and there could therefore not be any breach of trust by the society in this case.

Cases referred to:-

- (1) *Richards v. Delbridge* (1874) L.R. 18 Exch. 11.
- (2) *Milroy v. Lord* 4 D.F. & J. 264.
- (3) *Warriner v. Rogers*, L.R. 16 Eq. 340, 384.
- (4) *Sir Han Hoe Lim v. Lim Kheng Seng* [1956] M.L.J. 142.
- (5) *Re Marshall's Will Trust* [1945] 1 All E.R. 550.
- (6) *Thomson v. Seluns* [1901] 1 Ch. 921.
- (7) *Grimthorpe's (Baron) Will Trusts* [1958] 1 All E.R. 765.

CIVIL SUIT.

Morris Edgar for the plaintiffs.

R. R. Chelliah for the defendants.

Cur. Adv. Vult.

Abdul Hamid J.: The plaintiffs' claim is for the return of \$179,400 and further or alternatively damages for breach of trust.

It is alleged that the first plaintiff (hereinafter referred to as "the donor") as donor of a school and premises under the name and style of Kishan Dial School (hereinafter referred to as "the school") conveyed and entrusted the school by a lease and declaration of trust to the defendant society (hereinafter referred to as "the society") a trust subject to certain terms and conditions.

It is further alleged that during the terms of the trust, the society committed a breach of the aforesaid trust by converting the trust funds to uses other than those intended by the donor.

On or about 14th September, 1965, the donor executed an agreement described as a lease and declaration of trust (annexure "A" to the statement of claim and hereinafter referred to as "the document"). Under the document, the donor conveyed a lease of the school and premises to the society as tenants free of yearly rent in consideration of the society maintaining and managing the school and premises and on condition that the society shall continue to operate, manage and run the school in the name and style of Kishan Dial School.

Pursuant to this document, the society took over the management of the school at the premises known as 7, 8 and 9, Kandang Kerbau Road, Kuala Lumpur.

In 1959, a certain piece of land, lot 242, section 72, Kuala Lumpur, was given to the society as a gift. The lease was subject to express condition that the school be put up on the land by the society. The society intended to put up a school with funds to be raised by way of donations from public bodies, fun-fairs, lotteries, flag days and the profits derived from the school. A Pure Life Society Educational Building

A Fund was set up. It was the intention of the society to name the new school "Kishan Dial School". However, after the death of Satyananda, the founder President of the Pure Life Society, it was resolved by the annual general meeting of the society that the school be named Satyananda School.

B The donor adduced evidence to show that James Lee Soo Chuan (P.W. 4) was retained to prepare a plan for a new Kishan Dial School and the bill was paid by the society. The plan relating to the new Kishan Dial School was passed by the Municipality. On application to the Social Welfare Lotteries Board, a sum of \$86,325 as a financial grant was given to the society to construct a new Kishan Dial School. The application to register the new school in the name of Satyananda School was made to the Ministry.

C An accountant, Mr. V. Chari (P.W. 3) who audited the accounts of Kishan Dial School stated that the school's annual reports reveal that various sums were transferred to the Educational Building Fund from time to time. A statement for 1963 (P. 13) was produced to show the contributions made to the Educational Building Fund and the payment of quit rent for the new school land. A further statement prepared in 1964 was produced to show the total income of the Kishan Dial School amounting to approximately \$179,400.

D Mr. W. E. Pereira (P.W. 6), a former headmaster of Kishan Dial School testified that the school was making a profit of about \$3,000 out of school fees and from this profit, the society made provision for the new school. He further stated that the foundation stone was laid for a new Kishan Dial School.

E As regards the facts, there does not seem to be any serious dispute. Primarily it is left for this court to examine the provisions contained in the document in order to construe from the words used the intention of the donor. In doing so, this court will look at the whole of the document and construe the words according to their proper meaning. Mr. Morris Edgar, counsel for the plaintiffs, has submitted that under this document, a trust is created for the education of scholars. It is further submitted that no special words are required to create a trust. A trust may be declared directly or indirectly and it is for the court to effectuate through the medium of implied trust. He cited *Richards v. Delbridge*⁽¹⁾ where at p. 14 Sir Jessel M.R. said —

F "The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words, 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the court may be to carry out a man's intention, it is not at

liberty to construe words otherwise than according to their proper meaning.

The cases in which the question has arisen are nearly all cases in which a man, by documents insufficient to pass a legal interest, has said, 'I give or grant certain property to A.B.' Thus, in *Morgan v. Malleon* the words were, 'I hereby give and make over to Dr. Morris an India bond;' and in *Richardson v. Richardson* the words were, 'grant, convey, and assign.' In both cases the judges held that the words were effectual declarations of trust. In the former case, Lord Romilly considered that the words were the same as these: 'I undertake to hold the bond for you,' which would undoubtedly have amounted to a declaration of trust.

The true distinction appears to me to be plain, and beyond dispute: for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift shew an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise."

In that case, the judgment was made in accordance with the Court of Appeal decision in the case of *Milroy v. Lord*⁽²⁾ and the more recent case of *Warriner v. Rogers*⁽³⁾ where Vice-Chancellor Bacon said —

"The rule of law upon this subject I take it to be very clear, and with the exception of two cases which have been referred to (*Richardson v. Richardson* and *Morgan v. Malleon*), the decisions are all perfectly consistent with that rule. The one thing necessary to give validity to a declaration of trust — the indispensable thing — I take to be, that the donor, or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration, should have effectually changed his right in that respect and put the property out of his power, at least in the way of interest."

In the present case, the document does not seem to disclose any beneficial interest of the donor which he may absolutely part with other than the rent which he would otherwise collect if such premises were to be let out. That however is not the basis of the donor's claim. It is the donor's allegation that the school as such was the subject matter of the trust. In paragraph 3 of the statement of claim, the plaintiffs allege that "the said school was made the subject of the charitable trust..." A school in the sense that it is an institution where children may attend classes with or without payment of fees, cannot to my mind, be held to be a beneficial interest sufficiently capable of being made a subject of trust unless it can be gathered from the purported declaration of trust that it is the donor's intention that whoever is entrusted with the management of such institution for the benefit of third parties, shall be entitled to be indemnified against costs and expenses which they may incur as trustees. In the present case, there is no indication of such an intention on the part of the donor. On the contrary, the society is expressly required to bear all the expenses incurred in the management and maintenance of the school, the maintenance of the library and the repair or alteration of the school including the payment of quit rent and assessment. For that reason, it is unreasonable for this court to infer from the document that it was the intention of the donor to entrust profits derived from the school, if any, for the benefit of the scholars. Furthermore it seems clear that there was no provision in the document to establish that there had been any effectual change of the donor's right in respect of the school or premises or that the said school and premises had otherwise been out of her power. Mr. Morris

A Edgar cited to me *Sir Han Hoe Lim v. Lim Keng Seng*.⁽⁴⁾ In that case, certain properties were assigned for the maintenance of a school. Such is not the case here. The society was given the entire responsibility of the school (clause 8) and had absolute discretion in the management of the school (clause 15). Besides the society was, as I stated earlier, solely responsible for the cost and expenses incurred in the management and running of the school.

Mr. Morris Edgar further submitted that the society was not allowed to use the profits for their own benefit. It was, he said, the intention of the donor that the society should only manage the school but not enjoy the benefits derived from the school. I find it hard to reconcile this contention in the light of the express provisions in the document. Mr. Morris Edgar quoted to me certain passages from *Halsbury's*, Vol. 38, third edition, p. 857 paragraph 1444 under the heading "Profits from trust property" where it states that —

"A person holding a fiduciary position in relation to property is not as a general rule allowed to deal with the property for his own benefit, and, if he does deal with such property, then, unless otherwise expressly provided, he is accountable for any profit that he makes."

And at p. 957 paragraph 1658 under the heading "Accountability of trustee for profit made out of his trust" it is stated that —

"It is a general principle, that, unless otherwise expressly provided, a trustee is accountable for any profit that he makes out of his trust. Moreover, the liability to account for a profit is not confined to cases where the profit is derived directly from the trust estate."

In my view, this question may be open for consideration if the court finds that by this document a trust is created. In any event, in dealing with the present case, the court cannot ignore the fact that there is an express provision which allows the society to retain the property acquired through the society or the school

Mr. Robert Chelliah drew my attention to the recital and various clauses in the document. He submitted that the document does not create any trust, let alone charitable trust. He referred to the definition of trust at p. 1 *Underhill's Law of Trusts and Trustees* which reads —

"A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or *cestuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation."

This definition was applied in *Marshall's Will Trust*.⁽⁵⁾ He further referred to certain features of a trust, one of which is that a trustee cannot hold in trust for himself and quoted a passage from *Lewin* 16th edition p. 14 under the heading "Trustee may be beneficiary". In support of his submission, the learned counsel cited *Re Thomson v. Selous*⁽⁶⁾ where at p. 922 Farwell J. said —

"The rule in *Shelby v. Alston* namely, that where equitable and legal estates, equal and coextensive, unite in the same person, the former merges, or, in other words, that a person cannot be trustee for himself, applies to a case where such estates unite in two or more persons." (See also [1948] 1 All E.R. 231 at 232).

Mr. Chelliah further submitted that this is not a trust but a mere agreement or contract which either the donor or the society or both can enforce against each other. He referred to *Underhill on Trust* 11th edition p. 5 under the heading "Nature of Trust" and a passage at p. 49 paragraph (c).

The other feature which Mr. Chelliah drew my attention to is that a trustee is not personally liable in the management of a trust. He referred to *Halsbury's*, Vol. 38, p. 943, paragraph 1633 and cited the case of *Grimthorpe's (Baron) Will Trusts*⁽⁷⁾ where Danckwerts J. at p. 769 said —

"It is commonplace that trustees, who take the onerous and sometimes dangerous duty of being trustees, are not expected to do any of the work at their own expense; they are entitled to be indemnified against the costs and expenses which they incur in the course of their office;"

Mr. Chelliah quite properly drew my attention to the clauses in the document which, he said, are ordinarily found in a written agreement. He pointed out and I agree, that under the document, the donor granted the society the school and premises free of yearly rents as tenants in consideration of the society operating, managing and running the school at No. 7, 8 and 9, Kandang Kerbau Road, Kuala Lumpur, in the name and style of Kishan Dial School. Paragraph 5 of the recital declares that the society is entitled to full rights of benefits derived from the school, whilst paragraph 7 of the recital and also clause 1 reveal the consideration for which the donor gave the tenancy free of rents to the society to run the school at those premises. Clauses 3 and 4 expressly provide that the maintenance shall be at the society's own expense including the payment of quit rent and assessment (clause 6) and costs for alteration or addition (clause 12). Clauses 7, 9 and 10 are conditions which ordinarily appear in tenancy agreements. Under clause 16, the society was given the power to terminate at any time by notice if the society was unable to perform their obligation and in the event of any termination pursuant to clause 16, it was expressly provided that the society was at liberty to retain to themselves all accretions movable or immovable acquired through the society, their agents or the school and whatever was incorporated to the school and premises or otherwise and that these shall be the entire and absolute property of the society alone. In this particular case, it is not disputed that the society had already surrendered the school and premises at No. 7, 8 and 9, Kandang Kerbau Road, Kuala Lumpur in the year 1965. Referring to clause 18, Mr. Chelliah submitted that it was a mere attempt to limit the right of the plaintiff to terminate or revoke the agreement. He further pointed out that the provision relating to arbitration was not a clause to be found in a declaration of trust.

I have stated earlier and I repeat that in order to determine whether the donor had intended to make a declaration of trust, it has to be borne in mind that, if I may use the words of Sir Jessel M.R. in *Richards v. Delbridge*, *supra* "...however anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning." Mr. Morris Edgar further contended that equity regards the intention rather than

A the form however it may be granted with respect I agree and may I say that that is exactly what the court is endeavouring to determine from the document executed between the donor and the society. From the tenor of the document and the nature of the terms and conditions which have been expressly provided, I am left with no doubt at all that all that the document lacked were the essential features of a trust. B The donor undeniably had intended to perpetuate the memory of her late father, Lala Kishan Dial. This is so stated in paragraph 2 of the recital. However it is further disclosed from that paragraph that the memory intended to be perpetuated shall be at the land and premises known as No. 7, 8 and 9 of Kandang Kerbau Road, Kuala Lumpur. C Special emphasis was made in clause 1 that the donor shall convey to the society a lease of the school and premises free of yearly rent in consideration of the society maintaining and managing the school and premises on the express conditions that the society shall continue to operate, manage and run the school in the name and style of the aforesaid Kishan Dial School. D The donor however clearly intended that the legal ownership shall not pass under the document. This is apparent from the provisions of clauses 1 and 6 of the document.

In consideration of the obligation imposed on the society, the donor gave the society the right to manage the school at their absolute discretion and to retain on surrender the property acquired through the society or the school. E If the society had the right to the benefits derived from the school, they were therefore perfectly at liberty, in my view, to use the profits from the school for any of the purposes provided under section 9 of the Pure Life Society (Shuddha Samajam) Incorporation Ordinance, 1957.

F Evidence was led to show that amongst other things, the new school was built as the new Kishan Dial School. In my opinion, it is immaterial what the society had originally intended to name the new school. If the entire property of the new school belongs to the society, it was entirely a matter for them to decide the name to be given to it.

G In my judgment, there has not been any effectual declaration of trust in this particular case. The document executed by the donor and the society could only amount, in my view, to an agreement or contract under which the parties have agreed to bind themselves to the terms and conditions provided therein. H Consequently I find that the society has not, for reasons which I have stated above, committed a breach of any trust. I would therefore dismiss the claim with costs.

Claim dismissed.

Solicitors: *Morris Edgar & Co.; R. R. Chelliah Bros.*